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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

UNITED STATES OF AMERICA, Plaintiff,

v.

STATE OF MAINE, ET AL., Defendants.

REPLY BRIEF OF THE COMMON COUNSEL STATES

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The Common Counsel States had not intended to file a Reply Brief, believing that the few points in plaintiff's Brief (P.B.) not heretofore fully dealt with could be answered at argument. However, this Court's Order of February 18, reducing the time for argument from four to three hours, requires the filing of this Reply Brief in the interest of adequate rebuttal.

1. The States' Constitutional Interests in the Continental Shelf Require Ownership By Them.

As shown at pp. 15-24 of our Brief (Br.), there is nothing in federal "external sovereignty" or in the foreign-affairs, defense and commerce powers which requires federal

ownership of continental-shelf resources. The States, on the other hand, have most substantial constitutional interests in these resources, which, unlike federal interests, require ownership of them. These State interests are described in the Amicus Brief of the Tidelands Committee of the National Association of Attorneys General, a brief with which the Common Counsel States are in entire agreement. In addition, a federal document issued recently by a Joint Committee of Congress gives a comprehensive vindication of the States' interests in continental-shelf development, and of the dilemma in which the States will find themselves if they are denied ownership of the resources. Outer Continental Shelf Oil and Gas Development and the Coastal Zone, National Ocean Policy Study, 93d Cong., 2d Sess. (1974). Ten copies of this report were lodged with the Clerk together with the Reply Brief of the State of Massachusetts.

According to press reports, another federal agency, the Environmental Protection Agency, a few weeks ago denounced current federal plans for continental-shelf development as premature, irresponsible and insensitive to legitimate State interests and concerns.

As detailed in the Amicus Brief, the negative economic impact of federal offshore development on the State Government of Louisiana amounted to $38 million in 1972 alone. A recent book, Baldwin and Baldwin, *Onshore Planning for Offshore Oil* (1975), shows (*e.g.*, pp. 11-17) that, for a variety of reasons, the impact of offshore development on our Atlantic coast will be far greater than it has been on the coastal States of the Gulf of Mexico. We are lodging ten copies of this book with the Clerk.

It is the seaboard States and their people, particularly the communities and people in the coastal zones, who bear the environmental, economic and social costs of offshore resources development. Among the direct costs are environmental degredation from the siting of refineries, pipeline terminals, supply bases, petro-chemical plants and

related facilities. The States have already suffered, and face in the future, substantial risks of large-scale pollution from oil spills and other causes, and from the less-well-known effects of chronic low-level discharges of oil into the sea.

Among the indirect, but possibly even more serious, effects are changes in land use (including the loss of valuable wetlands), shifting populations and employment patterns, demands for housing, and the expansion of public facilities such as schools, roads, police and fire protection.

The coastal States desperately need a degree of control over offshore development — subject always to the paramountcy of constitutionally delegated federal powers — in order to regulate that development so as to minimize the adverse consequences to them and their people. They also desperately need the revenue from continental-shelf exploitation to compensate them for the costs they necessarily incur from such exploitation and to enable them to deal effectively with the manifold problems which offshore development creates for them.

The federal interests in the shelf are all interests which can be fully satisfied by a paramount power of control, which the Constitution provides. Those interests do not require ownership or revenues. The States' interests, on the other hand — which may be entirely excluded and ignored unless the States have ownership — involve massive expenditures and do require ownership and revenues.

2. Plaintiff Distorts the Record as to the Pre-1600 Law of England.

Most of plaintiff's arguments on this subject are dealt with in our prior briefs. Two contentions need further comment.

First, plaintiff contends (P.B. p. 26, n.16) that "the Crown had no power to grant exclusive fisheries after

Magna Carta." In point of fact, virtually all the coastal fisheries had already been granted out to private owners prior to Magna Carta, as shown in our Supplemental Brief (S.B.), p. 19. The doctrine to which plaintiff refers grew up long afterwards, not being finally established until the 19th century. It was a corollary of the law respecting monopolies, and applied only to fisheries traditionally exploited by Englishmen in common, not to newly discovered resources (S.B. p. 40). Finally and conclusively, the doctrine never meant or was understood to mean that foreigners had any right to fish in the English seas; such common rights of fishery as were recognized were on behalf of English subjects only.

Second, plaintiff contends (P.B. p. 26) that the "older legal tradition" was summarized in 1575 by the lawyer Plowden, who maintained that the Queen had jurisdiction but not property in the sea. Plowden said this while arguing a case. The court's decision implicitly rejected the argument by deciding for Plowden's client, but on a wholly different ground and indeed one inconsistent with Plowden's argument (S.B. p. 38). The court decided that the foreshore in question had been granted by the crown to the predecessor in title of Plowden's client, thus recognizing that the crown had the power to grant it. The doctrine that the crown did own the seabed, fully elaborated during this period by Thomas Diggs, was the position of both the government and, whenever the issue came to be decided, of the courts.

3. The English Seas Were Within the Realm of England.

While plaintiff concedes (P.B. p. 27) that under 17th-century law England held both sovereignty and ownership of the sea and seabed in the English seas, it argues that these prerogatives were based solely on English naval occupation of those seas. That argument is absurd virtually on its face. No one could contend that at all times during

the 17th century England had the kind of total, exclusive, continuous naval control over every part of the English seas which plaintiff apparently thinks English law deemed necessary. Yet the legal definition of the extent of the English seas remain constant. The idea is unheard of in English law that the boundaries of the seas in which the crown held sovereignty and dominion fluctuated back and forth depending on the temporary fortunes of English naval power.

We have shown (Br. pp. 47-54) that occupation was not necessary under 17th-century law, either English or international, to establish and maintain sovereignty. That was established by discovery plus the performance of symbolic acts of taking possession. This Court has on several occasions recognized that rule. (See cases cited at Br. p. 51, n.36.)

Plaintiff replies (P.B. p. 32) that this doctrine applied only to land, not to water. In response it is perhaps sufficient to rely on the consistent justification put forward over many generations on behalf of English ownership of the American territorial seas and fisheries, as well as of the North American land mass. Title was invariably based on first discovery and the performance of symbolic acts. (See, *e.g.*, S.B. pp. 164, 172-74, 231.)

In addition, Keller, Lissitzyn and Mann's authoritative work *Creation of Rights of Sovereignty Through Symbolic Acts 1400-1800* (1938) describes (pp. 77-82) the basis for the English claim to the waters surrounding Spitzbergen and the right to exclude fishermen of other nations from those waters. It is there shown that the English claim to the waters surrounding Spitzbergen was based on discovery of the island itself and the performance of symbolic acts of sovereignty on the island. The waters were regarded as coming under English sovereignty by virtue of the title thus established over the land. See also S.B. pp. 84-85.

The Permanent Court of Arbitration's decision in 1909 in the case of *Norway* v. *Sweden*, the *Grisbadarna* case (Br. p. 52), confirms this doctrine in international law. That case held that under the law of the 17th century territorial waters were "an inseparable appurtenance" of the adjacent land territory and passed automatically to whoever was sovereign over the land.

It would be astonishing if English law had regarded England's maritime rights as expanding or contracting with temporary fluctuations in naval power, because the law of England was that the English seas were part of the territory or realm of England. No nation has ever taken the view that its lawful territory is reduced whenever there is a foreign incursion into it. Such an incursion is an invasion — to be expelled as rapidly as possible. It does not change boundaries, unless and until it is confirmed by an act of cession or a treaty of peace. England took exactly the same view of foreign incursions into its territorial seas.

Of course plaintiff denies that the seas were within the realm. But the fact that they were within it as a matter of English law is one of the most conclusively established points in the whole record. One need hardly look further than the celebrated *Ship Money Case* of 1637 (Br. p. 40), when counsel for both parties and all the judges of England, majority and minority, agreed in the most explicit terms that the English seas were as fully a part of the realm as England itself, and that the crown owned the seabed thereof. And we have cited literally dozens of other authorities that prove the same point (Br. pp. 40-41).

In reply plaintiff cites one single authority, Sir Henry Finch, who used the term "realm" in an unconventionally narrow sense, meaning only those areas in which the common law applied. That of course excluded the seas, which were governed by admiralty law. It also excluded, as Finch's text shows (S.B. p. 69), Wales and Ireland, but no one

denies that they were under the full sovereignty of the English crown and were thus part of the "realm" in the fuller sense. Indeed plaintiff, while balking at the word "realm," concedes (P.B. p. 27) that in 17th-century law England possessed "general sovereignty" in the English seas. So plaintiff's objection to the inclusion of the seas in the term "realm" seems only a quibble about terminology.

We think it is proved beyond any doubt at all that the English seas were part of English territory, *i.e.*, territorial waters. Nor was this any new doctrine in the 17th century; we have traced it back several centuries before that. Once this is understood, plaintiff's argument about shifting boundaries and a requirement of continuous occupation is seen as a complete mirage. Neither England nor any other nation has ever regarded the integrity of its sovereign territory as resting on so shaky and evanescent a basis as that.

It is also established that, even if exclusive maritime rights had depended on the maintenance of "occupation," such a requirement was fully met by England and the colonies with respect to the Atlantic marginal seas during the colonial period. In its own Brief to the Master (p. 143) plaintiff conceded that during this period control of the adjacent land meant control of the fisheries. The Master made the same admission (Report, p. 57). And the evidence of record makes it clear that such control was in fact asserted and exercised.

4. Plaintiff Misreads *Queen* v. *Keyn*, Which in Any Event Has Been Overruled.

Because of the plaintiff's major reliance on the English case of *Queen* v. *Keyn*, decided in 1876 (P.B. pp. 24-25), we address the issue again. We submit that plaintiff's analysis is wholly mistaken. The full text of the opinions in the case

is in the record (Maine *et al.* Exhibit No. 160); only a detailed perusal of those opinions can determine whether plaintiff or we are right.

Plaintiff is wrong in saying (Br. p. 24, n.15) that the case had two holdings, one of which was that the territory of England ended at low-water mark. In fact the sole holding of the case was that the admiralty court did not, as of 1876, have jurisdiction over crimes committed on the sea by foreigners. That is all the decision can possibly be said to have stood for — even before it was expressly repudiated by act of Parliament and by many subsequent decisions of England's highest courts. As the Privy Council said in the *Chelikani* case in 1916 (Br. p. 93; S.B. p. 470; Maine *et al.* Exhibit No. 165), the *Keyn* decision "had reference on its merits solely to the point as to the limits of admiralty jurisdiction; nothing else fell to be there decided."

Plaintiff persists in treating every remark in Justice Cockburn's lengthy opinion in *Keyn* as though it spoke for the entire court, or at least the majority. That is plainly wrong. Cockburn did think it necessary to consider where the realm of England stopped, and he did conclude that it stopped at the water's edge. To do so he engaged in an elaborate, casuistical straining of English legal history. His reason for doing so was that he believed that under then-existing international law it would have been improper for England to assert the right to try foreigners for crimes committed on the sea. However, even Cockburn freely acknowledged that earlier English law as to maritime sovereignty had been contrary to his view, and he nowhere claimed that what he thought was a change in the law had taken place prior to 1776. And when he analyzed the history of the admiralty jurisdiction, he expressed views squarely refuted by unpublished 17th-century cases which were not available to him but which are part of the record in this case (App. 721-38, 894-903).

The crucial fact for our purposes is that what Cockburn thought is of no authority as to the law of England, even as of 1876, for he was speaking only for himself. Every judge sitting in the case wrote his own opinion. A majority of 7 to 6 reached the result described above. But by no means all of the narrow majority shared Cockburn's views on anything except the result. In fact an analysis of the opinions demonstrates (App. 58-74, 80-81) that a majority of all the judges very plainly held that the territorial sea was part of the realm of England. Thus if the case were relevant at all, it would help the States here, not hurt them. As to Cockburn's dicta, they have been very frequently repudiated, both by the highest English courts and by this Court as historically and legally unsound. In the *Chelikani* case, for example, the Privy Council rejected Cockburn's dicta as neither "helpful [n]or sound" and returned to Lord Hale's traditional doctrine that the soil of the marginal sea belongs and had always belonged to the crown in property. See also S.B. pp. 469-71.

5. Plaintiff's Arguments Concerning the Colonial Charters Are Without Merit.

Plaintiff studiously avoids even mentioning the language in the charters which most conclusively and explicitly conveys the rights here at issue. For example, the New England Charter of 1620 granted all "fishings, mines, and minerals . . . both within the same tract of land upon the main, and also within the said islands and seas adjoining . . ." (Br. p. 70). We fail to understand how language could be any more explicit in declaring that continental-shelf mineral rights were granted. Most of the other charters contain similar language. The only possible ambiguity is with respect to the distance from shore to which such rights were granted. We have fully explained our reasons for believing it clear that the distance intended was 100 miles (Br. pp. 76-78, 81-84). Plaintiff's own witness on the colonial period conceded that the usual charter formula ("all islands within

. . . miles [or leagues]") — created a "sea of the province" extending to the stated distance (App. 535). Within those seas the fisheries, minerals and other royalties were granted.

It is worth mentioning that other charters, not discussed in the briefs, are generally similar in language but also contain, here and there, phrases which shed additional light if that were necessary. For example, the Maine Charter of 1639 mentions in the granting clause "all and singular the soil and grounds as well dry as covered with waters" (App. 274).

Plaintiff concedes that there is one charter formula that would have been adequate to convey the right here at issue. Plaintiff points out (P.B. p. 38) that the Newfoundland and Nova Scotia charters conveyed, out to ten and six leagues respectively, "the seas and islands." This, plaintiff says, is an outright grant of the sea and seabed, and proves that the crown wished to make a sharp distinction between the rights it was granting in Canadian waters and those it was granting farther south.

This theory flatly contradicts another argument, on the same p. 38 of plaintiff's Brief — that the crown did not grant the seas because "those rights simply were not within the gift of the crown."

Moreover, plaintiff entirely overlooks the fact that three charters issued by the Council for New England, including the Maine Charter of 1622, did include the precise granting language that plaintiff concedes conveyed the seas and seabed — "the seas and islands lying within 100 miles of any part of the coasts of the country" — in describing what the Council had received by its royal charter of 1620 (Br. p. 81). These are authoritative, contemporaneous constructions of what the crown had meant when it used the slightly different language of the 1620 charter. These grants by the Council were obviously not secrets to the crown. There is no evidence that the crown took exception to the paraphrase.

Plaintiff's admission that the Nova Scotia charter granted territorial waters with full rights of ownership enmeshes plaintiff in yet another dilemma. In 1691, the crown issued a charter which combined into one government Massachusetts, Maine and Nova Scotia. The language of this charter which granted maritime rights was uniform for all three colonies (App. 320). Yet on plaintiff's theory Nova Scotia had a territorial sea and the other two colonies did not. Does plaintiff contend that the 1691 charter was meant to abolish Nova Scotia's territorial sea — just at the time when the Anglo-French second hundred-years war was bursting into full force, with exclusive possession of the fisheries of those waters as one of the principal points at issue? Such a contention condemns itself for absurdity. But plaintiff's only alternative is to recognize that the uniform maritime language of the 1691 charter — all islands within ten leagues, and all mines, minerals, etc., within the premises — was sufficient to create or to continue a territorial sea for all three provinces.

6. The Three-Mile Limit Did Not Extinguish the States' Title.

Plaintiff's argument (P.B. pp. 51-55) that the three-mile limit foreclosed State claims to the continental shelf beyond that limit wholly fails to address most of our specific arguments to the contrary. Since the point is critical, we restate those arguments in summary form. (See also Br. pp. 111-29; S.B. pp. 389-427.)

Even if continental-shelf rights were extinguished and arose anew *ex nihilo* in 1945, under our constitutional system those seabed rights should be deemed to have arisen in favor of the States rather than of the Federal Government — a point the Truman Proclamation itself left carefully open, to be resolved by operation of law (S.B. pp. 450-51). In 1945 the United States did not claim the shelf for itself as opposed to the States. It claimed the shelf for

the nation as distinct from the rest of the world; but it left the assignment of shelf rights as between the Federal and State governments to the operation of our constitutional system.

A further reason for concluding that shelf rights thus arising would pass to the States is that the States' historic title, even if defective in some way because of 19th-century developments, is obviously superior to that of the Federal Government, which never even suggested that it might have any claim to these rights until Secretary Ickes, reversing a position he had taken earlier, did so in 1939.

In addition, even if international law during some period was adverse to the States' claims, in the end it was international law which gave way. No one doubts that today the States' claims are fully consistent with international law. No rational basis suggests itself for judging the States' claims today on the basis of an alleged doctrine of international law which, on the affirmative insistence of the plaintiff here, has been defunct for 20 years or more. The plaintiff, surely, will insist on having its own claims measured against present, not past, international law; otherwise it will find itself arguing that it owns nothing beyond three miles. Why are the States not entitled to the same treatment?

Third, the weight of authority and learned opinion is that the three-mile limit never attained that level of acceptance and consensus necessary to give it the status of a binding rule of international law (S.B. pp. 409-14).

Fourth, as Judge Philip Jessup testified in great detail (App. 111-13, 131-230, 490-527), the three-mile limit was never intended to cut off rights of the type at issue in this case; and it did not cut them off. The three-mile limit unquestionably did impair or cut back some of the States' traditional rights in the marginal seas. The three-mile limit came into existence as a curtailment, in the interest of free navigation, of the much broader rights of maritime sovereignty and dominion recognized under prior law. As

such, the three-mile limit meant that the States could no longer assert and exercise, as their predecessors in title had done during the colonial period, the right to exclude other nations from the surface fisheries beyond three miles. Nor could the States regulate surface navigation beyond that limit or collect taxes from foreign ships.

However, seabed resources, both sedentary fisheries and minerals, were regarded as an entirely different matter. This difference was recognized both in theory and in the practice of nations. Right through the entire period when the three-mile limit was in its heyday, virtually every nation in the world which had or discovered exploitable resources on its continental shelf asserted and exercised the right of exclusive exploitation, the three-mile limit notwithstanding.

The reasons for this recognized difference were several. The fundamental purpose of the three-mile limit was to maximize the right of free navigation. That purpose could be fully met without destroying the traditional right of coastal nations to exploit their seabed resources.

It was recognized, moreover, that these resources were by no means inexhaustible — as swimming fish were thought to be in those happier times — and that promiscuous, unregulated exploitation could quickly destroy them forever.

Further, exploitation of seabed resources typically involves fixed installations, machinery or permanent or semipermanent maritime bases. No nation would tolerate the establishment of such devices close to its shores by another nation or its citizens.

Finally, there was widespread awareness, for decades and even centuries before the Truman Proclamation, of the fundamental theoretical basis of the continental-shelf doctrine — that the seabed is land, not water, and that the relatively

shallow seabed constituting the continental shelf naturally belongs or appertains to the land mass to which it leads up, or of which it is a prolongation.

Whatever rationale one prefers, it is beyond dispute that nations in practice always asserted exclusive rights to their continental-shelf resources — not just to anciently known resources, on the basis of immemorial prescription, but to newly discovered or newly exploitable resources as well. Plaintiff's international-law witness Professor Henkin conceded this:

> "Q. Can you give me a single example from anywhere in the world within, say, the last 300 years where a valuable resource has been discovered on the seabed within, say, 60 miles of the coast of one state and no closer to the coast of any [other] state, when the coastal state has not claimed and exercised the exclusive right to exploit it?
>
> "A. I don't know of any such examples."
> (App. 541).

The United States, though one of the most zealous adherents of the three-mile limit, never challenged any of these actions by the nations of the world. Indeed, on the only occasion when the question arose in the waters of a United States possession, the pearl fisheries in Filipino waters, the United States acted like every other nation and asserted exclusive jurisdiction over them out beyond three miles (S.B. p. 402).

And in the Bering Sea arbitration of the 1890's, the United States regarded the exclusive right of a coastal state to exploit continental-shelf resources as an established principle, and attempted to extend the principle to cover surface seal fisheries. The United States in that arbitration

categorically repudiated the very argument plaintiff makes here — that the exclusive right to seabed resources existed only in a few special cases and is created only by an occupation of the seabed (S.B. pp. 405-07).

As the United States there pointed out, and as more recent international-law scholars treated in the briefs have agreed, an "occupation" requirement is not only somewhat unreal — the seabed cannot really be occupied — but is also radically unsound. Logically it would follow that whatever nation first discovered a continental-shelf resource could occupy it, whether it was the coastal nation or a nation halfway around the world. But no one has ever been willing to assert that a non-coastal nation could lawfully do this.

Thus even those writers who have talked about occupation as one of the bases for exclusive continental-shelf rights have agreed that only the coastal state has a right to make such an occupation. They have, moreover, set the standards of "occupation" so low as to be virtually fictional. And, finally, they have never been so silly as to say that the occupation must be carried out before the exploitable resource is discovered — which no one would bother to do. The upshot of all this is that even in academic theory, as well as in the uniform practice of states — which is far more significant in establishing international law — the coastal state has always been conceded the exclusive right to take those steps necessary, when an exploitable

resource is discovered, to ensure its conservation and exploitation in its exclusive interest. That is precisely the property right which the States claim here.

Respectfully submitted,

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